

To: Keith Phillips
From: Lara Fowler, Coordinator, Chehalis River Basin Flood Authority
Re: Chehalis River Basin-- Early Warning Leasing Issues
Date: November 28, 2011

Thank you for your time last week about the Early Warning System and the outstanding leases. This memo summarizes the factual and legal questions associated with both sets of leases. Based on my discussions with staff from both Lewis and Thurston Counties, the recommendation would be for the State Emergency Management Department to actually be the signatory on these documents, versus Lewis County as the Flood Authority's fiscal agent. Any questions are welcome, and your assistance on this issue is much appreciated.

Factual background

As you know, the Chehalis River Basin Flood Authority identified the need for additional flood warning to help decrease the impact of flooding in the basin. The Flood Authority hired WEST Consultants to design and implement an Early Warning System, including new equipment where needed. Funding for installing and testing the Early Warning has been provided by the Washington State Legislature; on-going operation and maintenance after July 2012 remains an issue to be resolved. Lewis County is acting as the fiscal agent for the Flood Authority.

There are six additional sets of gages to be installed. The equipment has been purchased and WEST Consultants is ready to proceed; however, legal access to both sets of sites must be resolved first. There are two sets of documents at question.

1. Weyerhaeuser lease:

The first lease would cover the installation of 5 gages on Weyerhaeuser property: 1 combination river/rain gage and 4 rain gages. Some of these gages are outside of Lewis County. Lewis County has written a letter to Weyerhaeuser indicating its approval as fiscal agent for the Flood Authority for a lease to be signed (see Attachment 1), and provided comments on a proposed draft lease for WEST Consultants to sign (Attachment 2) as WEST Consultants would be the ones purchasing the equipment and installing the gages on the Weyerhaeuser property.

Weyerhaeuser is willing to issue a lease to Lewis County or the Flood Authority, but not to WEST Consultants. Weyerhaeuser staff has also asked who will actually own the gages (WEST Consultants, or the County). As with the DNR land use license discussed below, Lewis County would prefer that the State be the signatory to the lease as the State is the purchaser of the equipment.

2. DNR land use license:

The second document would provide a land use license for the installation of a single rain gage on land owned by the Washington State Department of Natural Resources (DNR) near the Cedar Creek Corrections Facility (located in Thurston County). DNR has drafted a lease agreement (Attachment 3), which has been reviewed by the Lewis County legal counsel on behalf of the Flood Authority (Attachment 4). Similar to the Weyerhaeuser lease, DNR is asking for either the Flood Authority or Lewis County as the Flood Authority's fiscal agent to sign the land use license, while Lewis County would prefer a state entity to be the signatory.

Legal concerns from Lewis County

There are three major legal concerns raised by both sets of documents. The first relates to who will purchase, install, operate and maintain the gages. The second relates to liability coverage. The third relates to indemnification. In a November 18, 2011 memo (Attachment 4), Glenn Carter, from the Lewis County Prosecuting Attorney's Office, summarized the overall issue as follows:

With both sets of gages, Lewis County is not funding the purchase, installation, operation or maintenance of the rain gage, and County personnel will not enter onto DNR property. WEST Consultants will purchase, install, operate and maintain the facility with funding from the State. Although WEST is a “contractor” for the Chehalis Basin Flood Authority, the County is merely the “*fiscal agent*” for the Authority and a *conduit* of State funding for this project. The County does not determine what the contractor will or will not do, as those decisions are made by the Authority as a group and executed by the County solely in its capacity as fiscal agent. In the case of this particular project, the State has required the completion of the warning system is funding the project and is the appropriate licensee.

The State has funded the purchase, installation, operation and maintenance of the rain gage. For as long as the State is funding the installation, operation and maintenance of the gage, the State should be the “licensee.” When the State ceases to do so, the entity assuming the operation and maintenance of the rain gage presumably would enter into an appropriate license.

In reviewing the DNR land use license, Glenn made the following specific comments; similar comments have been raised in respect to the Weyerhaeuser lease:

PAGE 1: Lewis County is not purchasing, installing, operating or maintaining the Rain Gage and is not going onto the DNR property. The license is most appropriately issued to the State of Washington.

PAGE 2: The form of license assumes a private licensee. Private entities purchase commercial general liability policies. The county is a political subdivision of the State of Washington. Like the State, the county does not insure through such a private insurer. The insurance requirement is not suited to a political subdivision of the State. In the case of the County, it is “insured” through a Risk Pool of all but the largest counties in the state. It is not the type of insurance contemplated by this provision.

Further, the County has no “insurable interest” in this project. It is not “acting” so as to trigger the policy. It is not entering onto the property. It is not operating or maintaining the machinery. There is no act of the county for the county’s insurance to attach. The “insurance” required by the State will be a nullity. The County cannot give what the State is looking for.

WEST Consultants was required to provide insurance for this project. It has the insurance. If DNR wishes effective insurance coverage, it should request the appropriate certificate from WEST.

ADDENDUM A; TERMS; SECTION 4: The State is funding the purchase, installation, operation and maintenance of the gage. The license is most appropriately issued to the State.

ADDENDUM A; CONDITIONS; SECTIONS 4 AND 12: The county does not insure through a private insurer and the requirements of this section are not apt.

SECTIONS 5 AND 6: The county cannot legally indemnify any entity, including the State, against anything other than the county’s own willful or negligent acts. No county personnel will enter onto DNR property, install, operate or maintain the rain gage. The County cannot legally indemnify DNR from whatever happens on the site or as a result of the project.

Recommendation:

To help resolve these issues and to get the gages installed and working, both Glenn Carter and Mark Swartout with Thurston County have recommended the State hold the necessary leases/licenses for the Early Warning System.

Key Contacts to Date:

Julie Keough
Weyerhaeuser Company
Forest Land Use Manager
Central Washington Operations
(360) 446-3870
julie.keough@weyerhaeuser.com

Patrick Hennessy
Department of Natural Resources
Upland Leasing Specialist
(360) 902-1437
pat.hennessy@dnr.wa.gov

Glenn Carter
Lewis County Prosecuting Attorney
(360) 740-2767
Glenn.Carter@lewiscountywa.gov

David C. Curtis, Ph.D.
WEST Consultants
(916) 932-6870 (cell)
(916) 932-7402 (direct)
dcurtis@westconsultants.com

Attachments:

1. Letter from Lewis County BOCC to Weyerhaeuser
2. Draft lease agreement with Weyerhaeuser
3. Draft land use license from DNR
4. Nov. 18th memo from Glenn Carter on DNR license